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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No. 212

MASS COMMUNICATORS, INC., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

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Without offering fact or argument to support it, respondent tenders to the Court its conclusion that this case presents issues which are "of no general importance" and do not warrant further review by the Court (Resp. Br. 6). Thus deprived of the benefit of any presentation to the contrary, the Court is left to rely entirely on the matters advanced by the petitioner to show the genuine importance of the questions presented (Pet. 5). It follows that the Court ought to grant the petition unless it can find that the reasons advanced by the petitioner are not persuasive.

Respondent's first argument (Resp. Br. 6) neatly demonstrates the central error of which this petitioner is

complaining. It is the plainly defective logic that the Commission can possess discretion to prevent a forfeiture which the statute declares to be automatic.[1] This defect of reason leads to the further fallacy that the Commission has been endowed with the power to prevent a forfeiture in every circumstance, notwithstanding the obvious intent of Congress that there should be at least some circumstance in which forfeiture of a construction permit should occur "automatically".[1] Thus does respondent prove the validity of another of the reasons advanced by the petitioner (Pet. 6) for a grant of the writ, viz., that the statute ought not to be left with the construction given it by the majority of the Court below because the reasonableness of that construction is patently questionable.

Respondent's second argument is merely an extension of the first, and the defect of reason in the first also debilitates the second. What is worse, however, is that the second argument would result in a holding that the Commission has properly carved a huge area of discretion out of the mandate imposed by this Court upon the Commission in the *Ashbacker* case.[2] Surely the Court ought not to allow this landmark decision to be so sharply narrowed without a careful review.

The final argument of the respondent is destroyed by the very terms of the statute upon which it purports to rest. Section 319(c) of the Communications Act (Pet. App. C) is a safety valve. Before the Commission grants any construction permit it determines that the applicant is qualified and that the grant would serve the public interest. Precisely the same determination is made anew

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[1] Communications Act of 1934, as amended, Section 319(b) (Pet. App C).

[2] Ashbacker, Radio Corp. v. Federal Communications Commission, 326 U.S. 327.

whenever, as in this case, the Commission has before it an application for a new construction permit to replace a permit which has expired and has become forfeited. It was recognized, though, that some time after this threshold determination is made the Commission may receive word of facts or circumstances sufficient to put into question the qualifications previously established or the public interest previously ascertained. Therefore, by Section 319(c) the Commission was empowered to reopen its prior determinations when it has before it an application for a license to cover the construction permit. However, and here is the point, the statute expressly makes this safety valve operable only with respect to a "cause or circumstance first coming to the knowledge of the Commission since the granting of the permit".[3] In the instant case the serious questions raised concerning the qualifications of the permittee were brought to the attention of the Commission *before* it granted the new permit in place of the expired permit. The Commission made the grant nevertheless. This the Commission is precluded from doing by Sections 308, 309 and 319(a) of the Act,[4] and its error is not saved by the grant of authority contained in Section 319(c).

Conclusion

For the foregoing reasons, as well as those heretofore urged in the petition for a writ of certiorari herein, petitioner contends that said petition should be granted.

Respectfully submitted,

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September, 1959

[3] Resp. Br. 2.

[4] Pet. App. C.